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In the Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GULF OIL CORPORATION AND GULF MINERALS CANADA LIMITED, PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled to a writ of mandamus requiring the district court to grant defendant's motion for summary judgment in this antitrust case on the ground that the maintenance of the suit requires the adjudication of the legality of the acts of a foreign state.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes involved 2

Statement 3

Argument 6

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 13

Allied Chemicals Corp. v. *Daiflon, Inc.*, No. 79-1895 (Nov. 17, 1980) 8

American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 10

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 ..... 9, 10

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 ..... 9, 11

California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 14

Cantor v. *Detroit Edison Co.*, 428 U.S. 579 14

Compania Espanola de Navegacion Maritima v. *The Navemar*, 303 U.S. 68 ..... 11, 13

Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 11

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Page

Cases—Continued:

De Beers Consolidated Mines, Ltd. v. *United States*, 325 U.S. 212 ..... 7, 9

Ervin v. *Quintanilla*, 99 F. 2d 935, cert. denied, 306 U.S. 635 13

Fahey, Ex parte, 332 U.S. 258 9

General Atomic Co. v. *United Nuclear Corp. and Indiana & Michigan Electric Co.*, review denied, No. 80-1360 (Apr. 20, 1981) 4

Helstoski v. *Meanor*, 442 U.S. 500 9

Hunt v. *Mobil Oil Corp.*, 550 F. 2d 68, cert. denied, 434 U.S. 984 10

Industrial Investment Development Corp. v. *Mitsui & Co.*, 594 F. 2d 48, rehearing denied, 599 F. 2d 449 11

Kerr v. *United States District Court*, 426 U.S. 394 11

Mannington Mills, Inc. v. *Congoleum Corp.*, 595 F. 2d 1287 11

Peru, Ex parte, 318 U.S. 578 ..... 7, 10, 11

Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 12

Republic of Iraq v. *First National City Bank*, 353 F. 2d 47, cert. denied, 382 U.S. 1027 10

Ricaud v. *American Metal Co.*, 246 U.S. 304 10

Societe Internationale v. *Rogers*, 357 U.S. 197 4

Page

Cases—Continued:

Steele v. *Bulova Watch Co.*, 344 U.S. 280 11

Timberlane Lumber Co. v. *Bank of America*, 549 F. 2d 597 ..... 11, 12

Underhill v. *Hernandez*, 168 U.S. 250 9

United Gas Pipe Line Co. v. *Ideal Cement Co.*, 369 U.S. 134 13

United States v. *Aluminum Co. of America*, 148 F. 2d 416 11

United States v. *Pink*, 315 U.S. 203 13

United States v. *Sisal Sales Corp.*, 274 U.S. 268 11

United States Alkali Export Association v. *United States*, 325 U.S. 196 ..... 7, 9

Uranium Antitrust Litigation, In re, 617 F. 2d 1248 11

Uranium Industry Antitrust Litigation, In re, 458 F. Supp. 1223 3

Will v. *United States*, 389 U.S. 90 ..... 9, 11

Statutes and rules:

Clayton Act, Section 4, 15 U.S.C. 15 3

Sherman Act, Section 1, 15 U.S.C. 1 ..... 2, 4

Wilson Tariff Act, Section 73, 15 U.S.C. 8 ..... 2, 4, 11

28 U.S.C. 1407 3

28 U.S.C. 1651 7

Page

Statutes and rules—Continued:

Sup. Ct. R. 26 8

Sup. Ct. R. 27.2(a) 7

Miscellaneous:

Letter from Deputy Legal Adviser Elizabeth G. Verville to Solicitor General Wade H. McCree (Apr. 17, 1981) 8

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OPINIONS BELOW

The district court's oral ruling denying petitioners' motion for summary judgment (Pet. App. 1a-4a), and its pretrial orders incorporating that ruling (Pet. App. 5a-6a) and denying petitioners' motion for reconsideration (Pet. App. 11a-12a) are unreported.

JURISDICTION

The order of the district court was entered on December 17, 1980, and it denied reconsideration or certification on February 13, 1981. The petition for a writ of mandamus was filed on March 19, 1981. The jurisdiction of this Court is invoked under the All Writs Act, 28 U.S.C. 1651(a).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

Section 73 of the Wilson Tariff Act, 15 U.S.C. 8, provides:

> Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Section 4 of the Clayton Act, 15 U.S.C. 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

The Tennessee Valley Authority ("TVA") on November 18, 1977, filed a complaint alleging a conspiracy by the petitioners[1] and six other defendants[2] to fix the price of uranium sold in interstate and foreign commerce, to set minimum terms and conditions for the sale of uranium, to boycott TVA and other power systems which sought to purchase uranium on other terms, to allocate sales among the defendants, and to rig bids for such sales (Complaint, paras. 16, 17).[3] It claimed that the defendants rigged bids and set non-competitive prices in contracts with TVA for future delivery of 20 million pounds of uranium with a

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[1]The petitioners here are Gulf Oil Corporation ("Gulf"), a Pennsylvania corporation, and its wholly-owned subsidiary, Gulf Minerals Canada Limited ("GMCL"), which is incorporated in Canada.

[2]TVA filed this complaint in the Eastern District of Tennessee. It simultaneously filed similar complaints in two other districts against other defendants. All three cases were consolidated for pretrial proceedings with a suit by Westinghouse Electric Corporation in the Northern District of Illinois under 28 U.S.C. 1407 (*In re Uranium Industry Antitrust Litigation*, 458 F. Supp. 1223 (J.P.M.D.L. 1978)).

TVA has reached settlements with all of the defendants except Gulf, GMCL, and one other defendant, the United States firm Engelhard Minerals & Chemicals Corporation.

[3]TVA, the nation's largest electric generating system, operates nuclear reactors fueled by uranium.

market value of more than $500 million (*id.* at paras. 12, 18). It asserted that the conspiracy and the actions taken to implement and conceal it unreasonably restrained interstate and foreign commerce in violation of Section 1 of the Sherman Act (15 U.S.C. 1), and restrained competition in the importation of uranium in violation of Section 73 of the Wilson Tariff Act (15 U.S.C. 8).[4]

Petitioners own uranium mines in Canada. During discovery in this and related cases they have not complied with requests for the production of documents or information located in Canada, asserting that Canadian government regulations, issued on September 21, 1976, prohibit such disclosures (Pet. App. 15a, 274a-276a). The Supreme Court of Canada has refused to order disclosure of the documents in response to letters rogatory (Pet. App. 265a-292a), and the Canadian government, appearing as amicus curiae below, has supported petitioners' refusal to produce them on the basis of Canadian policy and law (Pet. App. 46a-63a). On November 7, 1979, after considering the factors identified in this Court's decision in *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), the district court ordered production of the documents (Pet. App. 21a-29a, 43a-44a), finding that the information in them is "directly relevant to a number of fundamental issues" in the case, and that the "[p]laintiffs seek vital information relating to, among other things, * * * the impact of [an] alleged conspiracy on United States interstate and foreign commerce, [and] the defendants' defenses of sovereign compulsion" (Pet. App. 41a). It deferred ruling on possible sanctions for noncompliance (Pet. App. 24a-26a, 29a).

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[4]On April 20, 1981, this Court denied review of a New Mexico default judgment in another suit similarly involving claims of antitrust violations in the marketing of uranium. *General Atomic Co.* v. *United Nuclear Corp. and Indiana & Michigan Electric Co.*, No. 80-1360. The petition here states (Pet. 3) that that case and this one are "related" and go to the same "central issue."

On March 3, 1980, TVA moved for sanctions against seven defendants, including petitioners, for failure to provide discovery. TVA alleged, *inter alia*, that petitioners' failure to comply was a result of bad faith, including the storage of documents in Canada anticipating that the Canadian government would object to their release. The proposed sanctions included entry of a default judgment. On April 11, 1980, petitioners countered with a motion for summary judgment, urging that the court lacked subject matter jurisdiction or should refrain from exercising subject matter jurisdiction. They argued, *inter alia*, that the act of state doctrine precluded "judicial involvement" because "[p]laintiffs herein ask this Court to pass upon the sovereignty of foreign nations, the wisdom of their uranium policies, and the integrity and motivation by which they implemented these policies" (Memo in Support 41). They also contended that "[t]he doctrine of foreign sovereign compulsion bars judicial action here because of the compulsion exercised over GMCL, a Canadian corporation, by the Government of Canada" (*id.* at 46).

The Canadian Government again filed an amicus brief. It noted that it had secured the participation of all Canadian uranium producers in the cartel organized in 1972 "by declaring it to be Government policy to participate in the arrangement, specifying that the prices and quantities would be enforced by Government action, and making clear that company participation was expected in the national interest" (Pet. App. 107a-108a; footnote omitted). It contended, however, that all cartel activities, including sales, took place outside the United States, that no impact on the United States was anticipated in light of the United States' embargo on uranium imports (imposed in 1964 and lifted prospectively in November 1973) and because "the arrangement did not extend to sales to the United States" (*id.* at

119a). The amicus brief asserted that inquiry into the uranium export activities of Canadian companies "outside the United States and within the scope of Canadian Government laws" would infringe Canadian sovereignty, hurt Canadian firms, and strain Canadian-American relations (*id.* at 105a, 115a, 120a-121a).

TVA responded that the court had subject matter jurisdiction because the petitioners were a United States corporation and its wholly-owned subsidiary, that the complaint alleged a conspiracy that adversely affected United States interstate and foreign commerce (TVA Memo in Opp. 6), and that there were numerous issues of material fact to be tried, citing evidence that cartel members acted outside the scope of the Canadian regulations on which petitioners relied.

Without ruling on the motion for sanctions,[5] the district court denied the motion for summary judgment. It held that "foreign combinations or agreements are subject to the Sherman Act if they have an effect upon American commerce," and that the plaintiffs had submitted sufficient evidence to go to a jury on that issue (Pet. App. 1a-2a). The court found no genuine act of state question with respect to petitioners, and held that their defense of sovereign compulsion also raised issues of fact to be resolved by a jury (*id.* at 2a-3a).

Petitioners did not seek relief in the court of appeals, but instead filed the instant petition for a writ of mandamus to seek review of the district court's refusal to grant summary judgment.

ARGUMENT

1. The petition should be denied because petitioners have not "set forth with particularity why the relief sought is

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[5]An evidentiary hearing on the motion was held in June and July 1980, but the district court has not yet ruled on it.

not available in any other court," as required by Sup. Ct. R. 27.2(a). Indeed, they cannot make this showing, because the court of appeals plainly has the authority to issue the writ of mandamus which they seek. 28 U.S.C. 1651. Therefore, petitioners attempt to bring this case within the narrow exception to Rule 27.2(a) recognized in *Ex parte Peru*, 318 U.S. 578 (1943). But *Ex parte Peru* holds that a party may bypass the court of appeals only in a case "of * * * public importance and exceptional character" (318 U.S. at 586), and it defines those cases very stringently. The issue in *Ex parte Peru* was whether a district court could refuse to allow a claim of sovereign immunity formally recognized by the State Department with respect to the libel of a vessel owned by the Republic of Peru. 318 U.S. at 581. The State Department was attempting to settle the underlying dispute by diplomatic means, and it informed this Court that the district court's refusal to recognize the claim of sovereign immunity was embarrassing it in the conduct of American foreign relations. 318 U.S. at 588. It was only in light of these extraordinary representations by the Executive that the Court held that it was permissible to bypass the court of appeals. 318 U.S. at 587.[6] In this case, by contrast, there are no ongoing displomatic efforts to settle any international dispute that would justify denying judicial relief. Instead petitioners here are private parties, and the Executive Branch has not asked the district court to stay its hand in deciding the litigation[7]; in fact the Executive Branch has

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[6]We are unaware of any case since *Ex parte Peru* in which this Court has bypassed a court of appeals able to grant relief and issued a writ of mandamus directly to a district court. Petitioners' citation (Pet. 21) of *United States Alkali Export Association* v. *United States*, 325 U.S. 196 (1945), and *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945), is inapposite, since in these government civil antitrust cases the Expediting Act deprived the court of appeals of jurisdiction.

[7]The petitioners incorrectly characterize the court's exercise of jurisdiction as contrary to the policies of the Executive Branch on the basis

criminally prosecuted Gulf, an American corporation, for activities as part of the cartel.

2. Petitioners have failed to set forth grounds for issuance of a writ of mandamus by any appellate court. Mandamus is an extraordinary writ "to be invoked only in extraordinary situations." *Allied Chemicals Corp.* v. *Daiflon, Inc.*, No. 79-1895 (Nov. 17, 1980), slip op. 2. See also Sup. Ct. R. 26. Its function is to confine a lower court to its

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of certain letters to the courts (Pet. App. 245a-252a) and the limits of the government's own criminal prosecution of Gulf (Pet. 19-21). The letters regarding this case to the Clerk of the Seventh Circuit Court of Appeals and to Judge Marshall merely attest to the authenticity of the foreign governments' concern and indicate that those concerns should be given appropriate weight in accordance with applicable United States legal principles (Pet. App. 251a). Under those principles, international comity is only one of several factors to be weighed, and the letters express no opinion as to the relative weight it should be given in the circumstances of this case. No such opinion should be implied. Instead, the State Department has informed the Solicitor General as follows:

> Petitioners * * * assert that continuation of the proceedings at the District Court will damage the conduct of U.S. foreign relations and create uncertainty in the international business community. As the Legal Adviser previously wrote the Seventh Circuit Court of Appeals in a letter transmitted and concurred in by your Department, we firmly believe the courts should give due consideration to the views of interested foreign governments. In particular, while not dispositive, the concerns of the governments involved in this litigation are strongly held and deserving of due consideration by the court. We do not believe that the process of judicial consideration in and of itself must result in damage to our foreign relations and uncertainty in the business community.

Letter from Deputy Legal Adviser Elizabeth G. Verville to Solicitor General Wade H. McCree (Apr. 17, 1981).

Similarly, the Government's prosecutorial decision to file only a misdemeanor charge against Gulf (*United States* v. *Gulf Oil Corp.*, Crim. No. 78-123 (W.D. Pa.)) was made on the basis of its own legal theories, the evidence then available to it, and the need to prove a criminal case by evidence showing guilt beyond a reasonable doubt. That prosecutorial decision is hardly a basis for estopping other parties from presenting the merits of their civil damage cases to the courts.

prescribed jurisdiction and avoid a usurpation of power, not to "control the decision of the trial court." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). The alleged error of the trial court in ruling on a motion for summary judgment in this case hardly amounts to a "usurpation of power" which would require this Court to grant an extraordinary writ and rule on the merits of a highly complex lawsuit without awaiting an appeal from a final judgment below. *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945). See *Will* v. *United States*, 389 U.S. 90, 98 n.6 (1967); *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

Petitioners' attempt to couch their argument in jurisdictional terms (Pet. 14, 16) adds nothing to its merit. A court always has jurisdiction to determine its own jurisdiction,[8] and, in any event, the act of state doctrine upon which petitioners rely is not a matter of jurisdiction. The act of state doctrine, which states that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" (*Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897)), is a principle to guide the court's decision. It merely "concerns the limits for determining the validity of an otherwise applicable rule of law." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 438 (1964). The doctrine

> does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to

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[8]An erroneous denial of a motion to dismiss or for summary judgment on jurisdictional grounds is ordinarily a matter to be corrected on appeal after a final decision on the merits. *United States Alkali Export Association* v. *United States*, 325 U.S. 196, 202-203 (1945). Cf. *Helstoski* v. *Meanor*, 442 U.S. 500, 505-506 (1979). Such appellate restraint is particularly appropriate in cases such as this where elements of the jurisdictional arguments depend on factual assertions that are inextricably intertwined with the merits of the case: *e.g.*, the question whether the alleged conspiracy had an effect within the United States is pertinent not only to the court's jurisdiction, but also to proving TVA's damages.

> appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.

Ricaud v. *American Metal Co.*, 246 U.S. 304, 309 (1918). Similarly, in *Banco Nacional de Cuba* v. *Sabbatino, supra*, on which petitioners rely, this Court, after quoting the above passage from *Ricaud* (376 U.S. at 418), did not decline jurisdiction to adjudicate the case before it, but decided the issue of rightful title to the money in issue on the assumption that the Cuban expropriation of sugar involved was valid. See *id.* at 438-439. Thus, the act of state doctrine requires the district court to assume the validity of the Canadian government's acts within Canada, and to grant judgment on the merits for petitioners if they establish, contrary to TVA's claims, that TVA's injury is attributable solely to those acts. Compare *Hunt* v. *Mobil Oil Corp.*, 550 F. 2d 68, 74 (2d Cir.), cert. denied, 434 U.S. 984 (1977), with *Republic of Iraq* v. *First National City Bank*, 353 F. 2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966).[9]

In sum, the district court's decision to proceed to a decision on the merits, even assuming, *arguendo*, that it was erroneous, was hardly a "usurpation of power" warranting a grant of mandamus.[10]

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[9]We note that the petitioners have not relied on an intervening act of state under *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), or *Hunt* v. *Mobil Oil Corp., supra*, as providing a complete defense in either the district court or this Court. Nor can they reasonably do so, since the Canadian cartel excluded the United States market (*supra*, page 5). Rather, they have contended that their participation in the cartel was required by the Canadian government. That is, as the district court held, a defense of sovereign compulsion, not of act of state (Pet. App. 2a).

[10]*Ex parte Peru, supra*, does not aid petitioners. The narrow principle upon which that case was decided was that "courts may not so exercise

3. Petitioners have also failed to show that they have a "clear and indisputable" right to summary judgment on the record in this case. See *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976); *Will* v. *United States*, *supra*, 389 U.S. at 96; *Bankers Life & Casualty Co.* v. *Holland*, *supra*, 346 U.S. at 384.

The district court has jurisdiction to adjudicate the alleged violations of the antitrust laws arising from activities in foreign countries where such conduct is intended to and does affect this country. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (2d Cir. 1945). Cf. *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 288 (1952). Indeed, Section 73 of the Wilson Tariff Act, 15 U.S.C. 8, which expressly prohibits conspiracies in restraint of United States import trades, necessarily contemplates the exercise of such jurisdiction. While discretionary limitations may be placed on the exercise of that jurisdiction based on principles of international comity,[11]

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their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations." 318 U.S. at 588. Even that holding was qualified by the rule that, absent formal recognition of a claim by the Executive Branch, the foreign government could be put to its proof of possession and right to immunity. 318 U.S. at 587-588; *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68, 75 (1938). See page 7, *supra*.

[11] *In re Uranium Antitrust Litigation*, 617 F. 2d 1248, 1255 (7th Cir. 1980); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294-1298 (3d Cir. 1979); *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F. 2d 48, 53 (5th Cir.), rehearing en banc denied, 599 F. 2d 449 (1979); *Timberlane Lumber Co.* v. *Bank of America*, 549 F. 2d 597, 613-615 (9th Cir. 1976).

the exercise of that discretion depends on a close examination of the facts in each case.[12]

Petitioners do not claim an abuse of discretion here, nor could they fairly do so. The trial court's pretrial rulings represent its informed and considered judgment on the basis of applicable authorities in light of its long familiarity with the case, as shown, for example, in the court's careful opinion on the discovery of documents withheld under the requirements of foreign law (Pet. App. 13a-44a). Moreover, the trial court had before it "the equivalent of six or eight transfer cases of materials that have been submitted, not just on these but on other motions as well" (Pet. App. 2a). Those materials included evidence that aspects of the conspiracy were intended to and did directly affect United States import and export trade, that petitioners took actions in the United States to promote and to conceal the conspiracy, and that many of the terms of sale imposed by the cartel, as well as the application of those terms to trade within the United States, extended beyond the conduct authorized by Canadian regulations or policies. Such evidence raised disputed issues of fact, and additional evidence "is largely in the hands of the alleged conspirators," so the district court was entirely correct in denying summary judgment. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 473 (1962).

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[12] *E.g.*, under *Timberlane Lumber Co.* v. *Bank of America, supra*, 549 F. 2d at 615:

> [T]he problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

Petitioners would avoid that evidentiary dispute by claiming that United States courts must give conclusive effect to official representations by foreign governments allegedly establishing that "they mandated the behavior challenged" even though there are no statutes, regulations or court orders manifesting that compulsion (Pet. 18). Even assuming such representations were made, petitioners cite no cases to support their claim of conclusive effect, for no authoritative decision does so. This Court has previously held that a foreign government's interpretation of its own law, through an agency empowered to interpret that law, will be considered binding on United States courts. *United States* v. *Pink*, 315 U.S. 203, 220 (1942). But that is merely an analogue of the rule that the interpretation of the law of a state by its highest court is binding on the federal judiciary. *E.g., United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962). It does not preclude the requirement of proof, by competent evidence, of the facts necessary to make such a law applicable.[13]

In fact, the statements of the Canadian government upon which petitioners rely do not establish that a foreign government "mandated the behavior challenged" (Pet. 18). In describing the cartel the Canadian Supreme Court has said only that "the Government is [a] party * * * and it has promoted the arrangements * * * " (Pet. App. 290a). The most that the Canadian government has said in its briefs as

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[13]To the extent petitioners claim that their own actions as members of the cartel were "acts of state," they must show "that the conduct in question was the public act of those with authority to exercise sovereign powers." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 694 (1976); *Compania Espanola de Navegacion Maritima* v. *The Navemar*, *supra*, 303 U.S. at 75; *Ervin* v. *Quintanilla*, 99 F. 2d 935, 939-940 (5th Cir. 1938), cert. denied, 306 U.S. 635 (1939). They have clearly not done so here.

amicus curiae is that it "directed its Government-owned corporations to participate" (Pet. App. 107a) and (*id.* at 107a-108a; footnote omitted):

> The Government also secured the participation of all Canadian uranium producers. That was essentially done by declaring it to be Government policy to participate in the arrangement, specifying that the prices and quantities would be enforced by Government action, and making clear that company participation was expected in the national interest.

With respect to the domestic "state action" exemption, this Court "has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-593 (1976) (footnotes omitted). The "threshold inquiry," rather, is "whether the anticompetitive activity had been required by the State acting as sovereign." *Id.* at 600. The Canadian government's brief indicates that the government encouraged the petitioners to join the cartel, but, fairly read, it falls far short of a declaration of legal compulsion. Indeed, it makes a clear distinction between "directing" the participation of the government-owned corporations and "securing" the participation of the others. Moreover, in stating that prices and quantities were to be "enforced by Government action," Canada's brief indicates that the government would merely adopt whatever terms were set by the cartel, thus "casting * * * a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). Finally, the Canadian government has insisted throughout its briefs that sales in the United States were not covered by the cartel marketing arrangement that it authorized (Pet. App. 49a, 77a, 107a, 121a), and the Canadian directives upon which petitioners rely as setting minimum

prices expressly exclude sales to the United States (compare Pet. 7 with Pet. App. 255a-263a). And, of course, the Canadian government has never suggested that it authorized bid-rigging, boycotts, or other similar actions affecting uranium sales in the United States. The Canadian government's position is thus not inconsistent with TVA's allegations that petitioners participated in activities affecting United States commerce beyond the conduct mandated by Canadian laws. Indeed, such activities would be unlikely to have been known to the responsible Canadian officials.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

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